

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MARINA KEE,	)	CIVIL ACTION
	)	
Plaintiff,	)	
	)	
vs.	)	NO.: 11-cv-7789
	)	
ZIMMER, INC.,	)	ELECTRONICALLY FILED
	)	
Defendant.	)	

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**[PROPOSED] SUPPLEMENTAL MEMORANDUM IN  
SUPPORT OF MOTION TO DISMISS PLAINTIFF'S  
COMPLAINT BY DEFENDANT, ZIMMER, INC.**

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Date: February 24, 2012

Defendant, Zimmer, Inc. (“Zimmer”) submits this Supplemental Memorandum in response to Plaintiff’s opposition to Defendant’s Motion To Dismiss Plaintiff’s Complaint (“Complaint”). Zimmer disagrees with Plaintiff’s arguments in its opposition and believes that its Motion to Dismiss addresses and refutes the issues raised by Plaintiff, with one exception. Zimmer therefore only counters in this Reply Plaintiff’s argument that it is not a “buyer” and, accordingly, is not required to give notice prior to a breach of warranty claim.

Plaintiff cites to one only case to support her argument that she is not considered a “buyer” under the U.C.C., *AFSCME v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, Case No. 08–cv–5904, 2010 WL 891150 (E.D. Pa. Mar. 11, 2010). (Opp. at 8.) Plaintiff appears to be suggesting that she is a third-party payor and therefore does not qualify as a “buyer,” relying on *AFSCME* to support this proposition. (*Id.*) *AFSCME*, however, stands for the exact opposite of that proposition.<sup>1</sup> The court held that plaintiffs, who were third-party payors, “are in fact considered both ‘persons’ and ‘buyers’ under the UCC.” *Id.* at \*4. The court then dismissed

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<sup>1</sup> It is possible that Plaintiff may have relied on a portion of the opinion summarizing each parties’ arguments—“Defendants assert that . . . Plaintiffs, as third-party payors, do not qualify as ‘buyers’ under Pennsylvania’s UCC.” *AFSCME*, 2010 WL 891150 at \*4 (emphasis added).

plaintiffs' breach of warranty claims because the third-party-payor plaintiffs were required to plead notice and failed to do so. *Id.* Plaintiff's argument that she is not a "buyer" is not supported by any case law and should be dismissed.

Dated: February 24, 2012

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

*s/John P. Lavelle Jr*

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